IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11/12/2003

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice N. KANNADASAN

W.A. No.559 of 1999

Francis Vincent Neelankovil
Trichur, Kerala ... Appellant

-Vs-

1. The Industrial Tribunal
Madras-104

2. Management of the
Catholic Syrian Bank Limited
rep. by Assistant Manager, Madras ... Respondents

Appeal under Cl.15 of the Letters Patent against the order dated 7-8-1998 in W.P. No.12175 of 1988

!For Appellant :: Mr. N.G.R. Prasad for
M/s. Row and Reddy

^For Respondents :: Mr. Sampathkumar, Senior Counsel
for M/s. Sampathkumar and
Associates

:JUDGMENT

V.S. SIRPURKAR, J.

The judgment of the learned single Judge, allowing the writ petition filed by the second respondent bank (in short 'the bank'), challenging the award passed by the Industrial Tribunal and upholding the order of dismissal by the bank, is in challenge before us.

2. The appellant herein was employed as a clerk in Purasawalkam branch of the bank. On 15-12-1977, a demand draft dated 12-11-1977 issued by the National Bank of Omen, drawn in favour of one K.C. Appukuttan was brought to the bank by one V.T. Lazar, who had account in that bank, for being deposited in his account. That draft was endorsed by the said payee. The draft was presented along with the usual pay-in slip at the

counter of the bank, which was manned by the appellant. It later on turned out that the amount covered in the said demand draft was not credited to the account of V.T. Lazar and, therefore, he complained to the bank. He also produced the counterfoil which disclosed that the demand draft, which was made payable at the Bank of America was received from the V.T. Lazar for being credited to his account.

2.1. On the complaint being received, it was found that the amount was deposited in the name of the appellant , who had received the said draft along with the pay-in slip duly filled in. The amount covered by the said draft was credited to the account of the appellant on 16 -12-1977 and on the very next day, he also drew the money from his bank account. The appellant kept on working in the bank till 26-12-197 7 and thereafter, gave a leave letter and went on leave on account of his alleged illness. He did not turn up for the work for more than two months. He produced a medical certificate.

2.2. The bank, on the basis of the complaint given by Lazar, instituted an enquiry and an explanation was called on the basis of the said complaint dated 9-1-1978. The appellant wrote a letter on 20-1-1978 wherein he owned up the two charges levelled against him and urged that the charges were true and that he had committed the said acts by mistake and without thinking about the seriousness of his action and he sought apologies. He also wrote that he prepared to accept the disciplinary action without any reservation.

2.3. The departmental enquiry proceeded in respect of the fraud played by the appellant because in the investigation it came to light that the appellant had fraudulently written his name in the main foil of the pay-in slip while on the counterfoil meant for the customer, the name of Lazar was written. The counterfoil also bore a portion of the rubber-stamp of the bank, suggesting that the draft mentioned therein was deposited in the bank.

2.4. The appellant took part in the enquiry. He cross-examined witnesses also. He also examined himself. The said Lazar was also thoroughly examined and he supported his case to the hilt. He gave out a statement that after depositing the draft, he left the bank in a hurry and the appellant had gave him the counter-foil of the pay-in slip in the evening at his residence. He also asserted that he enquired with the appellant as to whether the amount had been collected and he was told by him that it will take some time as it was the year-end closing time. He also further asserted that he had gone to enquire from the appellant but he was not in the bank and, therefore, made a complaint to the Branch Manager of the bank, who after making enquiries, found that the amount covered by the said demand draft had in fact been collected and credited to the account of the appellant instead of Lazar. Though he was cross-examined, nothing really came out of the corss-examination in respect of the material allegations. The bank Manager was also examined and he pointed out that the draft had been sent for collection and was also realised on 16-12-1977 and the amount was credited on 16-12-1977 to the account of the appellant and was withdrawn by him also.

2.5. The defence raised by the appellant was slightly unusual. He said that he accepted that the draft was given to him by Lazar for collection but, he claimed that on the following day he found that there was no signature of Lazar on the reverse side of the draft and, therefore, he thought of saving time and put his own signature on the reverse and got the draft credited to his own account. According to him, he had drawn the money only with an

intention to give it back to Lazar but he could not do so as later on he fell ill.

2.6. The appellant was found guilty on all the counts. In reply to the second notice before proposing the punishment, the appellant asserted that he had already paid the amount to the customer without furnishing any details about the date and place of payment. Ultimately, he came to be dismissed from service on 10-6-1978.

2.7. The dismissal order was challenged before the Industrial Tribunal vide I.D. No.85 of . No oral evidence was let in by either party. Ex.M-1 to M-28 were marked by consent of the Management. The appellant also did not challenge the enquiry.

2.8. The Tribunal endorsed the finding of misconduct perhaps because those findings were never challenged before it. The finding of the Tribunal is to be found in paragraph 6. The Tribunal had went on to observe that the bank had paid the amount to Lazar on 9-1-1978 and that since the appellant had learnt about the said payment having been made by the bank, he paid the same to the bank. The Tribunal noted that since the bank could not confirm this claim by the appellant due to the non-availability of the records, the Tribunal held that the money was returned by the appellant was correct . Ultimately, the Tribunal held that though the misconduct was proved, which was the subject-matter of the first charge, the third charge of unauthorised absence was only a minor misconduct. The Tribunal dubbed the whole affair as a 'temporary misappropriation made in a momentary fit of indiscretion'. The Tribunal, therefore, came to the conclusion that the appellant was entitled to the sympathetic treatment and, therefore, came to the conclusion that the punishment was more harsh than necessary and thus set aside the dismissal and directed the reinstatement with continuity in service as also 50% of the backwages.

3. The order of the Tribunal was challenged by the bank before the learned single Judge and it was contended that the discretion shown by the Tribunal was perverse. It was pointed out that in the wake of proved misconduct, that too of a very serious nature, the Tribunal could not have dubbed it as an 'act of momentary indiscretion'. It was pointed out that the misconduct of misappropriation was complete and could not be said to be temporary because it is nowhere proved that the appellant had in any manner returned the money to the bank. It was also pointed out to the learned single Judge that it was a case of absolute fraud involving more than one offences under the Indian Penal Code that the appellant had in fact prepared false documents and had misappropriated the money and had further falsely claimed that the misappropriated amount was returned to the bank for which there was absolutely no basis. The Tribunal, therefore, could not have merely dubbed it as an 'act of momentary indiscretion' without analysing the grave nature of the fraud played by the appellant.

3.1. The learned single Judge allowed the writ petition and that is how the matter is before us.

4. Shri N.G.R. Prasad, learned counsel for the appellant very vociferously argued before us that once the Tribunal had used its

discretion under Sec.11-A of the Industrial Disputes Act and had awarded the punishment of the cut of 50% of the backwages, the learned single Judge, in his jurisdiction under Art.226 of the Constitution, could not have found fault with the discretion. Learned counsel argues that to begin with, this was no misappropriation at all and it was a honest misunderstanding on the part of Lazar, who had also at subsequent stages favoured the exoneration of the appellant. He further points out that the appellant had deposited the draft in his own account solely with an idea to help Lazar, who was in a hurry and could not collect the amount then and there. He points out that the theory of the bank that the appellant wrote his own name on the main foil of the pay-in slip while writing the name of Lazar on the counter-foil was itself not correct and once that theory falls down, there was no scope for holding that the appellant had committed any misappropriation. This the learned counsel tried to suggest from producing the xerox copies of the counterfoil which bear a portion of the bank stamp. Learned counsel says that if that was the case then, the remaining part of the bank-stamp should have been there found on the counterfoil in which the name of the appellant was written, obviously in the handwriting of the appellant. That not being there, according to the learned counsel, the first charge had to fail necessarily.

4.1. Learned counsel then goes on to point out that even if it was accepted that the appellant had deposited the money in his own account, that should not be held against the appellant as that was with the honest intention to return the money to Lazar. Ultimately, the learned counsel went on to suggest that even if all the findings of facts had been endorsed by the Tribunal, the Tribunal, in its' wisdom, had used its discretion considering the unblemished record of the appellant, which was bound to be considered and which was not considered by the bank while inflicting the punishment, and, therefore, the discretion shown by the Tribunal could never have been interfered with by the learned single Judge. According to him, the learned single Judge had committed jurisdictional error.

5. Shri Sampathkumar, learned counsel for the bank, reiterated that in fact it was a grave crime committed by the appellant which was not only admitted by him but, later on proved in the departmental proceedings to the hilt. Learned counsel points out that the Tribunal had also endorsed that misconduct and gave a clear-cut finding in support thereof. Under such circumstances, if the Tribunal showed undue sympathy, it was nothing but perversity on the part of the Tribunal. Learned counsel suggests that the learned single Judge was perfectly correct in holding that the discretion shown by the Tribunal under Sec.11-A in respect of quantum of punishment was perverse. Learned counsel also took up the position that where the enquiry was found to be in keeping with the principles of natural justice and where the findings were also endorsed then, the Tribunal should not have used its' discretion in perverse and, therefore, the learned single Judge was correct in interfering with the order of the Tribunal and restoring the punishment of dismissal.

6. The learned single Judge has painstakingly examined the decisions cited on behalf of the appellant before him which pertained to the principles of awarding punishment and also regarding the discretion to be used by the Tribunal. We need not go into all those decisions since they were not

pressed into service before us and rightly so as the law is settled on the question of jurisd iction of the High Court under Art.226 of the Constitution while examining the award of the Labour Court. From the facts, the learned single Judge found that the appellant had played worst kind of fraud by firstly making false documents, depositing the draft in his own name; by keeping this information from Lazar and by lying to him regarding the true state of affairs regarding the draft and lastly by avoiding to pay the said amount to Lazar. In paragraph 17 of the judgment, the learned Judge has noted that at every point of time, the appellant was taking recourse to the falsehoods.

7. Shri Prasad tried to urge before us that this was nothing but a honest help tried to be given by the appellant to Lazar as Lazar was in a hurry and had left the draft without signing the same on the reverse and it was therefore got deposited by the appellant in his own account with the sole idea to return the money. It is clear from the evidence and from the documents that on 15th, when the bank draft was deposited, the appellant met Lazar in the evening and also gave the counterfoil to him which bore the bank stamp, suggesting that the draft mentioned on the counterfoil was in fact deposited in the bank in the name of Lazar. If the said counterfoil was given in the evening by the appellant to Lazar and if at that time, he did not disclose anything about the draft and kept quiet about the draft not having been deposited, it was obviously with an intention to cheat the customer. He had made a false representation to Lazar that the draft was duly deposited as per the counterfoil. The countefoil was also a false document made by the appellant who had put the stamp on the said counterfoil. If the appellant knew that the bank draft was not deposited much less in the name of Lazar to his account then, there was no necessity on the part of him to give Lazar the counterfoil, which was duly stamped. In fact, this evening-meet is admitted by the appellant himself. It is also obvious from the cross-examination of Lazar that the facts deposed by him in examination-in-chief were not at all controverted. Thereafter also, the appellant on the very next day deposited the said draft in his own account and as if that was not sufficient, the very next day, he withdrew the amount also from his account. He did not bother to inform anything about the depositing of the draft in his own name to Lazar and then made himself scarce after 26-1 2-1977. The appellant had ample opportunity to meet Lazar between 17 th and 25th December. He did not do so and instead claimed that he was suffering from conjunctivitis . Learned Judge has analysed all these and has recorded a finding that the fraud played by the appellant was not an ordinary one. It was a deliberate attempt to cheat the bank as also the customer and had the effect of bringing the bank into disrepute.

8. Indeed, it is not necessary for us to go into all that because in the very first blush, the appellant had admitted his guilt though he resiled from it later on and as if that was not sufficient, even the Tribunal has endorsed the finding of guilt. We cannot, therefore, entertain the argument of Mr. Prasad that this was not a fraud or misconduct in the real sense of the term. Mr. Prasad, however, tried to describe the whole affair as a minor petty youthful indiscretion on the part of the appellant. He pointed out that even the Tribunal had taken the same view that it was an

'act of momentary indiscretion' and, therefore, not viewed seriously by the Tribunal. The main thrust of the argument is that once the discretion has been shown by the Tribunal under Sec.11-A of the Act, there was no scope for the learned single Judge to interfere. We find ourselves unable to agree on this principle. Learned single Judge has given very cogent reasons highlighting the peculiar position of the appellant where the evidence of the customer was the most material aspect. The learned Judge very rightly found that here was a bank-employee who patently duped the customer and also harmed the bank's reputation.

9. The learned counsel also noted that the misconduct was admitted though the appellant later on tried to wriggle out of his admission by suggesting that it was taken under coercion. Mr. Prasad also wanted us to hold that it was merely because of the representation made by the Manager that the appellant had owned up his mistake. We agree with the learned Judge when the learned Judge discards the theory of the so-called coercion. In our opinion, there was nothing but a very bare attempt on the part of the appellant to escape from the inevitable departmental enquiry. We also agree with the learned single Judge where it is held by him that it is only when the Tribunal discharges its functions judicially, a value can be attached to the discretion exercised by it and it is only if that discretion is properly exercised, the same would not be interfered with by the High Court. Learned Judge has also quoted the law laid down by Justice M. Srinivasan in South India Sugars Limited case (1989 II MLJ 1044) and Justice A.M. Ahmadi (as His Lordship then was) in Municipal Corporation of City of Ahmedabad (1987 I LLJ 152). The learned Judge has then come to the conclusion that if the Labour Court has come to the conclusion on the basis of the cases that the labour court had not exercised its jurisdiction in a judicious manner then, the order is liable to be reviewed by this Court. The law laid down by the Supreme Court in Hindustan Steels Case (AIR 1970 SC 1401) was also relied upon by the learned single Judge to hold that it becomes the duty of the court to interfere with the order which has not been made in proper exercise of the discretionary power after examining all the relevant circumstances and the materials.

10. At the instance of Shri Prasad, we also went through the order of the Tribunal to see whether the Tribunal has properly exercised its discretion. A glance at the order suggests that the Tribunal has merely treated this to be a temporary misappropriation. Mr. Prasad also heavily relied on the finding to that effect. In our opinion, this could not be a case of mere temporary misappropriation. In this, the appellant, a bank clerk, had firstly made a false document, on that basis made a false representation to the bank customer, cheated the customer and in the process made unlawful gain of Rs.500/- himself and on the top of it had claimed that he had returned the whole money even before the enquiry begun. It has come out clearly that that claim was clearly false. All that the Tribunal has mentioned is that the appellant had unblemished past service record and that was not taken into consideration by the punishing authority along with the extenuating circumstances existing in the case before the punishment of dismissal was awarded to him and that this was in contravention of clause 19.12(c) of the bi-partite settlement. According to the Tribunal, there was

no evidence let in on behalf of the bank to controvert the statement put forward that the appellant had unblemished record of service and that this misconduct was in his youthful indiscretion. All this was clearly perverse thinking. Here was a man who had made false vouchers, dubed the bank customer, misappropriated the whole amount and on the top of it, never bothered to return the money. It could not therefore be, by any stretch of imagination, called and brushed aside as 'temporary misappropriation'. Therefore, in reality, the Tribunal had not taken into account the grave consequences of the act on the part of the appellant and had merely dubbed the whole affair as 'youth indiscretion'. After all, till that time the appellant had put in four years of service. Therefore, this could not be a case of long unblemished service. That apart, a mere continuation of the service by itself does not add any credit to the employee and cannot be compared with the grave misconduct that the appellant had committed. In our opinion, the Tribunal had gravely erred in awarding the service back along with the 50% of the backwages. That was indeed a unique piece of thinking and, in our opinion, the learned single Judge was absolutely correct in interfering.

11. Mr. Prasad very heavily relied on two decisions. The first such case is SHANKAR DASS v. UNION OF INDIA AND ANOTHER (1985 (2) LLJ 1 84) That was a case where the Supreme Court had allowed the appeal of an employee, who had failed to deposit Rs.500/- though he had collected the same on behalf of the bank being its collecting agent. He was let off by the criminal court on the probation considering the typical circumstances that he had lost his son in February 1962, his wife had suffered a serious injury immediately thereafter and his daughter fell seriously ill and remained so far eight months. The Supreme Court found fault with the bank in choosing to dismiss the appellant in a huff without applying its mind to the penalty which could properly be imposed upon him in so far as his service career was concerned.

12. We do not find any parallel though Mr. Prasad very heavily relied on this case. According to Mr. Prasad this was also a case of misappropriation or criminal breach of trust only for Rs.500/-. That by for is the only similarity that we find. However, it is obvious that was not a case of a deliberate plan of cheating and perpetrating fraud. This is apart from the fact that the Supreme Court has shown mercy in the light of the facts of that case. We do not find any parallel.

13. Mr. Prasad also relied on the Division Bench judgment of the Gujarat High Court in PARMAR (R.M.) v. GUJARAT ELECTRICITY BOARD, BARODA (1983 (1) LLJ 261) , determining the scope of Sec.11A of the Industrial Disputes Act. There is nothing in this judgment which would persuade us to take a different view than the one which we propose to take. The principles which the learned Judges have discussed in this case which are to be found in paragraph 6 of the judgment do not apply as that was a case of taking of a petty article by a worker in a moment of weakness. There, the worker did not hold the sensitive post of 'trust'. It is also liable to be seen in that behalf that the Division Bench has observed:
"Taking of a petty article by a worker in a moment of weakness when he yields to a temptation does not call for an extreme penalty of dismissal from

service. More particularly when he does not hold a sensitive post of trust (pilferage by a cashier or by a storekeeper from the stores in his charge, for instance, may be viewed with seriousness)" (emphasis ours')
We need not say more than observing that here the appellant was working as a bank clerk and was in reality holding the position of 'trust'. He not only abused that position but went on to drive nails to his coffin by making false representations one after the other.

14. We do not find anything wrong in the order passed by the learned single Judge. In short, the appeal has no merits. It is dismissed. There shall be no order as to the costs.

To:

1. The Presiding Officer
Industrial Tribunal
Madras-104

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